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No. 93-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BANKRUPTCY PLAN COMMITTEE
OF THE BANK BUILDING & EQUIPMENT CORP.
OF AMERICA, IN LIQUIDATION,

Petitioner,

vs.

RELIANCE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT RELIANCE INSURANCE CO. IN RESPONSE TO THE *AMICUS CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

PERRY KREIDMAN
Counsel of Record
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
Attorneys for Respondent
Reliance Insurance Company
150 East 42nd Street
New York, New York 10017
(212) 490-3000

Of Counsel:
WAYNE BORGEEST
JONATHAN C. THAU
DAVID S. HEBBELER

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REASONS FOR DENYING THE WRIT

This brief is submitted by the respondent, the Reliance Insurance Company ("Reliance"), in response to the amicus curiae brief of the National Association of Bankruptcy Trustees (the "Association"). The Association's brief is devoid of any facts or law relevant to these proceedings or any additional matters warranting this Court's consideration.

The issue framed by the Association on which there is a purported conflict, a bankruptcy trustee's right to represent the creditors of the bankrupt company, is simply irrelevant to the

determination of coverage under Reliance's D&O insurance policy pursuant to Delaware law.

Furthermore, the alleged conflict is found in cases that have nothing whatsoever to do with coverage under an insurance policy. The cases cited by the Association, in general, involve situations either where creditors asserted a claim against the directors and officers of the bankrupt company based upon the creditors' own injuries, or where creditors' claims were actually being pursued by the bankruptcy trustee. In contrast, the Plan Committee Action is predicated upon the officers' alleged breach of fiduciary duties to BBC rather than to its creditors, and BBC's damages rather than its creditors' damages.

There will be no adverse impact upon bankruptcy proceedings if the exclusion in the D&O policy stands. The purported distinction between BBC, its bankruptcy estate, and its bankruptcy representative, on the one hand, and its creditors on the other, does not undermine the lower court's ruling that the exclusion for claims "on behalf of" BBC applies to the Plan Committee Action.

Based upon the foregoing, the reasons advanced by the Association do not warrant this Court's review.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE CONTROLLING QUESTIONS OF INSURANCE COVERAGE

The Association fails to identify a conflict among United States Courts of Appeals regarding the controlling issue in the case, the effect of an "insured vs. insured" exclusion of a directors and officers liability policy on a claim by a commercial corporation's bankruptcy representative against its former officers. The Association points to an alleged conflict among the circuits only on a bankruptcy trustee's *standing* to sue third-parties on behalf of creditors; however, the Plan Committee's standing on behalf of creditors or anyone else has never been questioned.

The Plan Committee Action was brought against the officers of BBC alleging a breach of fiduciary duty by these officers to

BBC, resulting in BBC's bankruptcy. As it made no reference to losses incurred by BBC's creditors, the Plan Committee was not pursuing a claim for such creditors.

The decisions relied upon by the Association do not involve determinations of coverage under an insurance policy.[1] This alleged conflict among the circuits does not justify a review of the lower court's decision on coverage under Reliance's D&O policy.

Of significance, this Court has already denied certiorari in two cases cited by the Association. *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, 485 U.S. 906, 108 S. Ct. 1077 (1988); *In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987), *cert. denied*, 484 U.S. 848, 108 S. Ct. 147 (1987). Those two cases, as well as the other decisions cited by the Association, would have been more suitable than this case to review an issue of standing under the Bankruptcy Code.

II. AS THE LOWER COURT CORRECTLY RECOGNIZED, THE COVERAGE UNDER THE INSURANCE POLICY MUST BE DETERMINED IN ACCORDANCE WITH DELAWARE LAW

The limited issue decided herein is whether *under Delaware law*, the Plan Committee Action is excluded from coverage by

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[1] *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988) (a trustee lacked standing to bring a lawsuit against the defendant on behalf of the debtor's creditors, even though the creditors had assigned to the trustee their claims arising from the bank's alleged participation in the debtor's fraudulent conduct); *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979 (11th Cir. 1990) (a bankruptcy trustee did not have standing to bring an action on behalf of creditors of the bankrupt dealer in government backed mortgage securities for negligence and improper interest charges); *St. Paul Fire & Marine Insurance Co. v. Pepsico, Inc.*, 884 F.2d 688 (2nd Cir. 1989) (corporation which had guaranteed the debts of its former subsidiary did not have standing to assert a claim against the subsidiary's new parent that was outside of the subsidiary's bankruptcy proceeding); *In Re Mortgage America Corp.*, 714 F.2d 1266 (5th

(Footnote continued)

Reliance's "insured vs. insured" exclusion. The Association instead portrays the decision below as touching upon matters of ". . . such importance to the bankruptcy system and to bankruptcy trustees. . . ." Association's Brief, p.1. The court merely resolved a specific and narrow question of coverage under an insurance policy by applying the principles that bankruptcy representatives derive their rights from the bankrupt company and that the terms and conditions of insurance policies remain enforceable after bankruptcy.

The Association does not discuss the Reliance policy or refer to a single case that construes an insurance policy, let alone an "insured vs. insured" exclusion. The Association instead cites authority on the question of a bankruptcy trustee's standing and related issues.[2] Such cases are inapplicable, as no question was raised about the Plan Committee's standing to sue BBC's officers.

Cir. 1983) (state law causes of action against individuals who control the corporate debtor are property of the estate, and thus the automatic stay provision of the bankruptcy code applied); *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, 485 U.S. 906, 108 S. Ct. 1077 (1988) (a trustee of a bankrupt corporation was the proper party to bring an alter ego action against the debtor's shareholders).

[2] *In Re Davis*, 899 F.2d 1136 (11th Cir. 1990) (bankruptcy trustee not entitled to recovery attorney fees incurred in prosecuting action against third-party seeking recovery of allegedly preferential transfer); *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979 (11th Cir. 1990) (bankruptcy trustee lacks standing to bring action against bankrupt securities broker on behalf of broker's former customers); *St. Paul Fire & Marine Insurance Co. v. Pepsico, Inc.*, 884 F.2d 688 (2nd Cir. 1989) (guarantor of its former subsidiary's debts did not have standing to assert claims against company who purchased subsidiary outside the former subsidiary's bankruptcy proceedings); *In Re Mortgage America Corp.*, 714 F.2d 1266 (5th Cir. 1983) (automatic stay provision of bankruptcy code applies to action by bank against individual who controlled corporate debtor); *Steyr - Daimler - Puch of America Corporation v. Pappas*, 852 F.2d 132 (4th Cir. 1988) (bankruptcy trustee who succeeds to the rights of the debtor can bring alter ego claim); *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988) (bankruptcy trustee lacked standing to bring suit against bank on behalf of debtor's creditors); *In Re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987) *cert. denied*, 484 U.S. 848, 108 S. Ct. 147 (1987)

(Footnote continued)

The record below reflects that creditors' claims have not been asserted by the Plan Committee against BBC's officers. Hence, the purported right of a bankruptcy trustee to represent creditors is irrelevant to the resolution of this case.

Strictly speaking, this case does not even involve a bankruptcy trustee. There is no reference in the bankruptcy records or filings, including the Plan or the Disclosure Statement, identifying the Plan Committee as the trustee of BBC's estate. A trustee's alleged right to represent creditors is therefore not even implicated.

Instead of addressing the question of coverage under the D&O policy, the Association asserts that the issue of who may ultimately receive the benefits of the trustee's efforts warrants review by this Court. That issue has no impact or bearing on whether the Plan Committee Action was commenced "on behalf of" the bankrupt entity. The Reliance policy excludes claims brought "by or on behalf of" the insured company, without regard to the identity or status of any person who might benefit from such a claim. The court correctly focused its inquiry on the actual policy wording, which does not in any way refer to BBC's creditors or any other third parties. Who *benefits* from a trustee's acts is simply not a material factor under Reliance's "insured vs. insured" provision. *See*, *Gary v. American Casualty Co. of Reading, Pa.*, 753 F. Supp. 1547, 1555 (W.D. Okl. 1990) ("regardless of to whom the benefits of any recovery on a D&O policy by the FDIC or the FSLIC might directly or ultimately inure, their claims are claims of the [failed] financial institution".)

The Association implicitly admits that the Plan Committee Action was commenced *on behalf of BBC* in stating that a

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(trustee had no standing under bankruptcy code to bring alter ego cause of action on behalf of corporate debtor's creditors); *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987) *cert. denied*, 485 U.S. 906, 108 S. Ct. 1077 (1988) (trustee of bankrupt corporation was proper party to bring alter ego action against debtor's shareholders); *Jones v. Hyatt Legal Services*, 132 B.R. 853 (Bankr. S.D. Ohio 1991) (trustee failed to state a cause of action against debtor's former attorneys for negligence and fraudulent misrepresentations).

"bankruptcy trustee . . . act[s] pursuant to rights derived from the debtor. . ." Association's Brief, p. 2, which is consistent with the ruling that the Plan Committee was acting on behalf of BBC in commencing the Plan Committee Action.

III. THE DECISION BELOW WILL NOT HAVE ANY SIGNIFICANT IMPACT ON BANKRUPTCY PROCEEDINGS

The Association believes that the decision below will adversely impact bankruptcy proceedings, with visions of creditors racing to the courthouse to seek the proceeds of directors and officers insurance policies outside the bankruptcy proceedings. If such third party claims are brought against the debtor or its property, 11 U.S.C. § 362(a) would automatically bar such actions. In addition, a bankruptcy court has broad and effective power under 11 U.S.C. § 105 to enjoin such actions to protect the estate. These Bankruptcy Code provisions dispel any unjustified concern that enforcing the insured vs. insured exclusion against a bankruptcy representative will somehow induce creditors to bring suits and dissipate the assets of the estate.

Of note, upon the filing of a bankruptcy petition, third-party actions against the debtor or estate property are automatically stayed:

> any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. . .

11 U.S.C. § 362(a)(3).

A bankruptcy court is also cloaked under 11 U.S.C. § 105(a) with authority to protect the debtor's estate and its administration, including enjoining proceedings affecting the estate. *In re Ionosphere Clubs, Inc.*, 111 B.R. 423 (Bankr. S.D.N.Y. 1990); *In re Wingspread Corporation*, 92 B.R. 87 (Bankr. S.D.N.Y. 1988); *In re Apollo Molded Products*, 83 B.R. 189 (Bankr. D. Mass. 1988).

Such remedies can be forcefully applied to creditors' actions seeking recovery of the proceeds of the debtor's insurance

policies, preventing a race to the courthouse by creditors. For example, in *In re Zenith Laboratory, Inc.*, 104 B.R. 659 (D.N.J. 1989), the district court affirmed a stay imposed under 11 U.S.C. § 105(a) on an action commenced by creditors against the debtor's officers and directors that sought recovery of, *inter alia*, the proceeds of the debtor's D&O policy.

In addition, a bankrupt entity's insurance policies are protected by the automatic stay under 11 U.S.C. § 362, thereby ameliorating the Association's concern of a "race to the courthouse" by creditors who are contemplating actions that could trigger coverage under the bankrupt's policies. *Matter of Fernstrom Storage & Van Company*, 938 F.2d 731 (7th Cir. 1991); *Tringali v. Hathaway Machinery Company, Inc.*, 796 F.2d 553 (1st Cir. 1986); *In the Matter of Gulf Tampa, Drydock Company*, 49 B.R. 154 (Bankr. M.D. Florida 1985); *Forty-Eight Insulations, Inc. v. Lipke*, 54 B.R. 905 (Bankr. N.D. Ill. 1985).

In view of the foregoing, the decision below, in holding that the Plan Committee Action is excluded by the insured v. insured exclusion, will not increase the claims flowing from a bankruptcy or impair a trustee's marshalling of the assets of the estate.

CONCLUSION

For the foregoing reasons, the arguments in the amicus curiae brief should be rejected by this Court, along with the petition for a writ of certiorari filed by the Petitioner.

Dated: New York, New York
February 4, 1994

Respectfully submitted,

PERRY KREIDMAN

Counsel of Record
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
150 East 42nd Street
New York, New York 10017
(212) 490-3000

Attorney for Respondent
Reliance Insurance Company

Of Counsel:
WAYNE BORGEEST
JONATHAN C. THAU
DAVID S. HEBBELER